Supreme Court, U.S.
FILED
SEP 10 2015
OFFICE OF THE CLERK

No. 14-981

In The Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

STEVEN J. LECHNER
Counsel of Record
JEFFREY W. MCCOY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jmccoy@mountainstateslegal.com

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. IN ORDER TO JUSTIFY A RACE-BASED PROGRAM, A GOVERNMENTAL ENTITY MUST PROVE THAT THE PROGRAM IS NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST	5
II. THE UNIVERSITY FAILED TO PROVE THAT ITS RACE-BASED ADMISSIONS POLICY WAS NECESSARY TO ACHIEVE ITS PURPORTED COMPELLING INTEREST IN RACIAL DIVERSITY	11
III. THE UNIVERSITY FAILED TO CLEARLY DEFINE THE ESSENTIAL EDUCATIONAL GOALS IT HOPED TO ACHIEVE WITH RACE-BASED ADMISSIONS	17
IV. THE UNIVERSITY'S INABILITY TO CLEARLY DEFINE ITS EDUCATIONAL GOALS DEMONSTRATES THE NEED FOR THIS COURT TO OVERTURN *GRUTTER*	21

TABLE OF CONTENTS – Continued

Page

A. *Grutter* Abandoned Longstanding Equal Protection Precedent By Deferring To A Governmental Entity's Statement Of A Purported Compelling State Interest 22

B. "Critical Mass" Is An Amorphous Concept That Cannot Be Addressed By A Narrowly Tailored Remedy 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) ..... *passim*

Brown v. Board of Education, 347 U.S. 483 (1954) 29

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ..... *passim*

Concrete Works of Colorado v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003) 2

DynaLantic Corp. v. U.S. Dep't of Def., 885 F. Supp. 2d 237 (D.D.C. 2012) 2

Edenfield v. Fane, 507 U.S. 761 (1993) 25

Fisher v. Univ. of Texas at Austin, 758 F.3d 633 (5th Cir. 2014) ..... *passim*

Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013) ..... *passim*

Fullilove v. Klutznick, 448 U.S. 448 (1980) 8, 18, 28

Grutter v. Bollinger, 539 U.S. 306 (2003) ..... *passim*

Helvering v. Hallock, 309 U.S. 106 (1940) 26

Johnson v. California, 543 U.S. 499 (2005) 5

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 25

Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 25

Loving v. Virginia, 388 U.S. 1 (1967) 29

TABLE OF AUTHORITIES – Continued

Page

McLaughlin v. Florida, 379 U.S. 184 (1964) 29

Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990) 8, 9

Monterey Mech. Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997) 10

Palmore v. Sidoti, 466 U.S. 429 (1984) 6

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) 10

Parham v. Hughes, 441 U.S. 347 (1979) 9

Payne v. Tennessee, 501 U.S. 808 (1991) 26

Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) 10, 24

Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) 11, 12, 29

Ricci v. DeStefano, 557 U.S. 557 (2009) 2

Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115 (1989) 25

Shaw v. Reno, 509 U.S. 630 (1993) 6, 7

Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180 (1997) 25

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000) 20

United States v. Virginia, 518 U.S. 515 (1996) 20

Washington v. Davis, 426 U.S. 229 (1976) 6

TABLE OF AUTHORITIES – Continued

Page

Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998) 10

Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986) 1, 10, 21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 6, 29

RULES

Supreme Court Rule 37.3 1

Supreme Court Rule 37.3(a) 1

OTHER AUTHORITIES

Carla D. Pratt, *The End of Indeterminacy in Affirmative Action*, 48 Val. U. L. Rev. 535 (2014) 18

Danielle Holley-Walker, *Defining Race-Conscious Programs in the* Fisher *Era*, 57 How. L.J. 545 (2014) 12, 13

Gail Heriot, Fisher v. University of Texas: *The Court (Belatedly) Attempts to Invoke Reason and Principle*, 2013 Cato Sup. Ct. Rev. 63 (2013) 12

Top Ten Percent Law, Tex. Educ.Code Ann. § 51.803 (West 2009) 14

TABLE OF AUTHORITIES – Continued

Page

John C. Brittain, *Affirmative Action Survives Again in the Supreme Court on a Legal Technicality: An Analysis of* Fisher v. University of Texas at Austin, 57 How. L.J. 963 (2014).....12

Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 Hastings L.J. 661 (2014).....12

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF has litigated for the equality of all persons, regardless of race, and for the application of strict scrutiny to all governmental racial classifications. For example, MSLF attorneys represented the plaintiffs in *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); and

[1] Pursuant to Supreme Court Rule 37.3(a), all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Concrete Works of Colorado v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003). MSLF has also actively participated as amicus curiae in a number of similar cases challenging racial preferences, including the earlier stages of this litigation. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) ("*Fisher I*"); *see also Ricci v. DeStefano*, 557 U.S. 557 (2009); *Dyna-Lantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 244 (D.D.C. 2012). MSLF brings a unique perspective to bear in this case by examining the nature and requirements of strict scrutiny to demonstrate that the panel majority abandoned its duty to strictly scrutinize the University of Texas at Austin's ("University") use of racial preferences in its admissions process.

SUMMARY OF ARGUMENT

This Court should reverse the judgment of the Fifth Circuit because the panel majority failed to follow this Court's instructions and apply strict scrutiny to the race-based aspects of the University's undergraduate admissions program. As this Court made clear, the educational aspects of this case do not exempt it from the requirements of strict scrutiny. This case, like all equal protection cases, requires a court to properly apply strict scrutiny because all race-based classifications are inherently suspect. Thus, before upholding a race-based government program, a court must ensure that the government has met its strong burden of demonstrating that a race-based program is narrowly tailored to achieve a compelling

state interest. If the government cannot meet that burden, then the court must hold the program unconstitutional.

In *Fisher I*, this Court vacated the previous decision of the Fifth Circuit upholding the University's race-based admissions program because the court impermissibly deferred to the University's justifications for using racial preferences. This Court clearly stated that the University's program could survive strict scrutiny only if the University demonstrated that no workable race-neutral alternatives would produce the University's purported interest in racial diversity on campus. Furthermore, although this Court stated that diversity could be a compelling interest for the University, it still instructed the Fifth Circuit to determine that the University offered a reasoned, principled explanation of its diversity goals.

On remand, the panel majority failed to require the University to prove that the race-neutral aspect of the University's admissions program or other race-neutral alternatives could achieve the University's purported interest in racial diversity on campus. Although Fisher demonstrated that the race-neutral aspect of the University's admissions policy had increased diversity of incoming students, the panel majority dismissed this evidence and acquiesced to the University's argument that the race-neutral aspect of the admissions policy did not achieve *enough* diversity. The panel majority then analyzed only two race-neutral programs that the University has adopted in an attempt to increase diversity before concluding

that race-neutral alternatives were not sufficient to achieve the University's diversity goals. This lackluster analysis was not strict scrutiny, and conflicts with this Court's instructions that the Fifth Circuit was required to independently analyze whether workable, race-neutral alternatives were available to achieve the University's purported goals. Because the University was unable to demonstrate that its program was necessary to achieve its purported compelling interest, this Court should hold the University's race-based admissions program unconstitutional.

Additionally, the panel majority failed to follow this Court's instructions regarding the University's purported compelling interest in achieving diversity. On remand, the University offered an unintelligible explanation for what it wished to achieve with its race-based admissions program. Instead of requiring a more reasoned explanation, the panel majority deferred to the University's statements that it was not achieving its vague, amorphous admissions goals. Because the University was unable to clearly articulate a compelling state interest, this Court should hold the University's race-based admissions program unconstitutional.

Finally, the panel majority's deferential attitude towards the University demonstrates the need for this Court to reexamine its decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Fisher I*, this Court stated that *Grutter* required that a court should defer, to some extent, to a university's academic judgment that achieving a "critical mass" of racial diversity on

campus is a compelling interest for a university. As demonstrated by the instant case, however, the goal of "critical mass" can rarely, if ever, be adequately articulated in a way that allows for a narrowly tailored remedy. As a result, if *Grutter* is not overturned, courts will be unable to properly apply strict scrutiny, and will instead impermissibly defer to a university's purported academic judgment of its diversity goals as the panel majority did below.

ARGUMENT

I. IN ORDER TO JUSTIFY A RACE-BASED PROGRAM, A GOVERNMENTAL ENTITY MUST PROVE THAT THE PROGRAM IS NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST.

This Court has repeatedly held that the burden is on the government to prove that a race-based program is necessary to achieve a compelling state interest. *Johnson v. California*, 543 U.S. 499, 505 (2005) ("the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling government interests") (quotations omitted); *Adarand*, 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."). This case is no different because, as this Court made clear, "higher-education affirmative action cases do not stand apart from 'broader equal protection jurisprudence,' . . . .

Put simply, there is no special form of strict scrutiny unique to higher education admissions decisions." *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 665 (5th Cir. 2014) (Garza, J., dissenting) (quoting *Fisher I*, 133 S. Ct. at 2418). Therefore, in this case, like any other case involving a race-based government program, the burden is on the University to demonstrate that its race-based admissions program is constitutional.

The "central purpose [of the Equal Protection Clause of the Fourteenth Amendment] is to prevent the states from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)). It was adopted to "do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Accordingly, courts must apply strict scrutiny to all race-based classifications, regardless of the government's justifications for such classifications. *Adarand*, 515 U.S. at 227.

It is imperative for a court to correctly apply strict scrutiny to racial classifications because "[r]acial classifications of any sort pose the risk of lasting harm to our society." *Shaw*, 509 U.S. at 657. Indeed, "[p]referment by race . . . can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting). Classifications based on race threaten to "balkanize us into competing racial factions; it

threatens to carry us further from the goal of a political system in which race no longer matters." *Shaw*, 509 U.S. at 657. Thus, "[t]he equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) ("*Croson*") (Scalia, J., concurring) (discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society").

This is true of even so-called "benign" racial classifications. In *Croson*, this Court ruled that "recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight" because "racial classifications are suspect and . . . simple legislative assurances of good intention cannot suffice." 488 U.S. at 500. As in *Croson*, this Court in *Adarand* ruled that "good intentions alone are not enough to sustain supposedly 'benign' racial classification[s,]" because such classifications would "inevitably [be] perceived by many as resting on the assumption that those who are granted this special preference are less qualified . . . purely by their race." *Id.* at 228-29. "Benign" racial classifications serve only to "exacerbate rather than reduce racial prejudice" and "will delay the time when race will become . . . truly irrelevant." *Id.* Consequently, "*all* racial classifications, imposed by *whatever* federal, state or

local governmental actor, must be analyzed . . . under strict scrutiny." *Id.* at 227 (emphasis added).

Furthermore, "[c]lassifications based on race carry a danger of stigmatic harm" to the individuals benefitted by racial preferment. *Croson*, 488 U.S. at 493. And such racial classifications "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* Thus, a racial classification:

> [I]nevitability is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception . . . can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become truly irrelevant[.]

Adarand, 515 U.S. at 229 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)); *see also Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) ("The dangers of such classifications are clear [–] [t]hey endorse race-based reasoning and the conception of a nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."). Indeed, "[s]uch policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution." *Metro Broadcasting*, 497 U.S at 604 (O'Connor, J., dissenting). In fact, "[r]acial classifications, whether

providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit." *Id.*

Therefore, "[u]nder our Constitution, there can be no such thing as either a creditor or a debtor race . . . [a] concept [that] is alien to the Constitution's focus on the individual." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in judgment). To the contrary, "[i]n the eyes of government, we are just one race here [–] American[.]" *Id.* In other words, there is no "racial paternalism exception to the principle of equal protection" and the requirement that courts apply strict scrutiny to all government classifications based on race. *Id.* at 240 (Thomas, J., concurring in part and in judgment).

The essence of strict scrutiny is that a court may not defer to the judgment of the government, or its professions of good faith, because "[b]lind judicial deference to legislative or executive pronouncements, of necessity, has no place in equal protection analysis." *Croson*, 488 U.S. at 501; *Fisher I*, 133 S. Ct. at 2421. "The presumption [of validity] is not present when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently 'suspect.'" *Parham v. Hughes*, 441 U.S. 347, 351 (1979). "A racial classification, regardless of purported motivation, is *presumptively invalid* and

will be upheld only upon an *extraordinary justification.*" *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (all emphasis added). Accordingly, no governmental entity may institute a race-conscious policy for any reason unless it has a "strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S. at 278 (1986) (plurality opinion); *Croson*, 488 U.S. at 510; *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring) ("[I]ndividual racial classifications . . . may be considered legitimate only if they are a last resort to achieve a compelling interest."); *Wessman v. Gittens*, 160 F.3d 790, 808 (1st Cir. 1998) (the government bears "a heavy burden of justification [for] their use," because "*Croson* . . . leaves no doubt that only solid evidence will justify allowing race-conscious actions."); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government.").

The panel majority failed to correctly apply strict scrutiny to the review of the University's race-based admissions program. This Court made clear that a race-based program can only be constitutional if it is necessary to achieve a compelling state interest, and only if no race-neutral alternative is sufficient to achieve that compelling state interest. *Fisher I*, 133 S. Ct. at 2420. As demonstrated below, the panel majority erroneously took only a cursory look at the government's justifications before upholding a race-based government program. Accordingly, this Court

should reverse the decision of the Fifth Circuit and correctly apply strict scrutiny to the review of the University's race-based admissions program.

II. THE UNIVERSITY FAILED TO PROVE THAT ITS RACE-BASED ADMISSIONS POLICY WAS NECESSARY TO ACHIEVE ITS PURPORTED COMPELLING INTEREST IN RACIAL DIVERSITY.

This Court should reverse the judgment of the Fifth Circuit because the University failed to "offer[ ] sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Fisher I*, 133 S. Ct. at 2421. On remand, the panel majority failed to apply strict scrutiny and hold the University to the standard articulated by this Court. Accordingly, this Court should reverse the judgment of the Fifth Circuit and hold the University's admissions program unconstitutional.

In *Fisher I*, this Court made clear that "[s]trict scrutiny must not be strict in theory but feeble in fact." 133 S. Ct. at 2411. This Court clearly placed the burden on the University to prove "that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." *Id.* at 2420 (quoting *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 305 (1978)). It directed the Fifth Circuit to perform a "searching examination" of the University's means of achieving the educational benefits of diversity. *Id.*

It also ordered the Fifth Circuit to determine whether "no workable race-neutral alternatives would produce the educational benefits of diversity." *Id.*

In so doing, this Court, "reshap[ed] the narrow tailoring prong of the strict scrutiny standard. . . ." Danielle Holley-Walker, *Defining Race-Conscious Programs in the* Fisher *Era*, 57 How. L.J. 545, 556 (2014) ("[*Fisher I*] will likely be remembered for reshaping the narrow tailoring prong of the strict scrutiny standard. . . ."). The decision strengthened the role of courts in cases challenging race-based government programs, and made clear that the burden is on the government to demonstrate the necessity of a race-based policy. *Fisher I*, 133 S. Ct. at 2420; Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 Hastings L.J. 661, 673 (2014) ("[*Fisher I*] narrows defendants' ability to satisfy narrow tailoring, making strict scrutiny even stricter than it was before.").[2] This Court made clear that "[t]he University must prove that the

---

[2] Several other scholars also recognized the monumental importance of this Court's decision in *Fisher I*. Gail Heriot, Fisher v. University of Texas: *The Court (Belatedly) Attempts to Invoke Reason and Principle*, 2013 Cato Sup. Ct. Rev. 63, 85 (2013) (In *Fisher I*, the Supreme Court "took the opportunity to clarify the applicable standard in broad terms."); John C. Brittain, *Affirmative Action Survives Again in the Supreme Court on a Legal Technicality: An Analysis of* Fisher v. University of Texas at Austin, 57 How. L.J. 963, 977 (2014) ("It remains to be seen [after *Fisher I*] how the lower courts will interpret the new clarification of the narrowly-tailored prong of the strict scrutiny test.").

means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference." *Fisher I*, 133 S. Ct. at 2420; *see also* Danielle Holley-Walker, *supra*, 57 How. L.J. at 549 ("Justice Kennedy asserts that the narrow tailoring analysis requires courts to examine whether the use of race is 'necessary.' In order to meet the narrow tailoring prong of the strict scrutiny standard, the University must show that they have exhausted race-neutral alternatives.").

The panel majority, however, did not follow this Court's clear instructions. The panel majority failed to analyze whether the race-based portion of the University's admissions policy was necessary to achieve diversity by failing to properly analyze the race-neutral aspect of the University's admissions policy, and by failing to analyze alternative, race-neutral admissions policies.[3] *See Fisher I*, 133 S. Ct. at 2420. Instead of applying the standard as articulated in *Fisher I*, the panel majority essentially conducted the same analysis as it did in the first appeal.

---

[3] For in-state admissions, the University automatically accepts any Texas high school student in the top ten percent of his or her class. *Fisher*, 758 F.3d at 638. To fill the remaining seats available to in-state students, the University conducts a holistic review and purportedly ranks students based on a combination of an academic index score, based on test scores and grades, and a personal achievement index ("PAI") score, based on personal characteristics including race. *Id.* The PAI score is weighted slightly more than the academic index score in the holistic review process. *Id.*

In its decision, the panel majority once again impermissibly deferred to the University's judgment. With regard to the Top Ten Percent Plan, the race-neutral aspect of the University's admissions policy, the panel majority recognized that the policy results in admissions of a wide-range of students with various backgrounds. *Fisher*, 758 F.3d 655-56. Despite this recognition, the panel majority adopted the University's argument that a race-neutral admissions policy did not achieve enough diversity, and needed to be supplemented with a race-conscious plan. *Id.* at 656. As explained by Judge Garza, the panel majority did not apply strict scrutiny:

> [E]ven accepting the University's broad and generic qualitative diversity ends, we cannot conclude that the race-conscious policy is constitutionally "necessary." The University has not shown that qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent Law, Tex. Educ.Code Ann. § 51.803 (West 2009). That is, the University does not evaluate the diversity present in this group before deploying racial classifications to fill the remaining seats.

Fisher, 758 F.3d at 669 (Garza, J., dissenting).

Furthermore, the panel majority failed to analyze whether workable, race-neutral alternatives are sufficient to achieve diversity as instructed by this Court. *Fisher I*, 133 S. Ct. at 2420 ("[S]trict scrutiny imposes on the university the ultimate burden of

demonstrating, *before turning to racial classifications*, that available, workable race-neutral alternatives do not suffice." (emphasis added)). Instead, the panel majority looked only at the University's scholarship and outreach programs in a purported attempt to analyze workable, race-neutral alternatives. *Fisher*, 758 F.3d at 647-49. The court stated that the goal of these two programs "'was to convince low income students that money should not be a barrier to attending college'" but concluded that the programs were not sufficient to achieve the University's diversity goals. *Id.* at 649.

This brief discussion of two race-neutral alternatives does not satisfy strict scrutiny. In order to justify its race-based admissions program, the University is required to present sufficient evidence to show that race-neutral alternatives cannot achieve its purported diversity goals, not a minimal amount of evidence showing that it might be inconvenient to implement a race-neutral alternative. *Fisher I*, 133 S. Ct. at 2420-21. Even assuming that the University is correct that the holistic review is necessary to achieve diversity, it never demonstrated that the racial component of the holistic review is necessary.[4]

---

[4] The panel majority concluded that, because there are test score gaps between races, "if holistic review was not designed to evaluate each individual's contributions to [the University's] diversity, including those that stem from race, holistic admissions would approach an all-white enterprise." *Fisher*, 758 F.3d at 647. This giant leap to a conclusion is suspect, and does not satisfy strict scrutiny, because the panel majority failed to consider any

(Continued on following page)

The University failed to present evidence of what the holistic review process would look like if the University only considered the race-neutral components of diversity. *Fisher*, 758 F.3d at 675 (Garza, J., dissenting) ("the Law creates a separate admissions channel for many minority students, which then calls into question the necessity of using race as a factor in the holistic review process for filling the remaining seats."). The University could have recalculated the personal achievement scores of applicants, excluding any score credited for race, and analyzed what effects, if any, the new calculations had on diversity.

Unfortunately, the panel majority disregarded its duty, and the instructions of this Court, and failed to apply strict scrutiny to the University's admissions policy. *Fisher*, 758 F.3d at 671-72 (Garza, J., dissenting) ("Perhaps, based on the structure of the University's admissions process, it is possible that the use of

---

other race-neutral alternatives, *e.g.*, getting rid of the holistic review aspect and admitting based on the top fifteen percent of students from all Texas high schools. *See id.* at 670 (Garza, J., dissenting) (disputing the University's conclusion that academic-based admissions do not achieve sufficient diversity). While the court did not need to consider every conceivable race-neutral alternative, strict scrutiny requires that it consider more alternatives than the two alternatives purportedly attempted by the University. *Fisher I*, 133 S. Ct. at 2420 ("Although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, strict scrutiny does require a court to examine with care, and not defer to, a university's serious, good faith consideration of workable race-neutral alternatives." (internal quotations omitted)).

race as a factor in calculating an applicant's PAI score incrementally increases the odds that a minority applicant will be admitted to a competitive college within the University. But hypothetical considerations are not enough to meet a state actor's burden under strict scrutiny."). Instead of requiring sufficient evidence to justify its race-based admissions program, the panel majority acquiesced to the University and upheld the program. Accordingly, this Court should reverse the judgment of the Fifth Circuit because the panel majority clearly disregarded this Court's instructions about how to apply strict scrutiny. Furthermore, because the University was unable to demonstrate that the race-based admissions program was necessary to achieve its purported compelling state interest, this Court should hold the program unconstitutional.

III. THE UNIVERSITY FAILED TO CLEARLY DEFINE THE ESSENTIAL EDUCATIONAL GOALS IT HOPED TO ACHIEVE WITH RACE-BASED ADMISSIONS.

The panel majority also disregarded this Court's instructions by failing to scrutinize the University's claims that it had a compelling interest in achieving racial diversity within the University. In *Fisher I*, this Court stated that in some cases racial diversity could be considered essential to a university's educational mission, and instructed that "some, but not complete, judicial deference" to the University's academic judgment is proper. *Fisher I*, 133 S. Ct. at 2419 (citing *Grutter*, 539 U.S. at 308). Importantly, this Court did

not authorize complete deference to the University's purported compelling interest in achieving racial diversity, and reiterated that "[a] court, of course, should ensure that there is a reasoned, principled explanation for the academic decision." *Id.* This Court made clear that "[s]trict scrutiny is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate,' . . . ." *Id.* (quoting *Croson*, 488 U.S. at 505 and *Fullilove*, 448 U.S. at 532 (1980) (Stevens, J., dissenting)).

In *Croson*, this Court stated that a compelling state interest in racial classifications must be clearly articulated in order to survive strict scrutiny. *Croson*, 488 U.S. at 505; *see also* Carla D. Pratt, *The End of Indeterminacy in Affirmative Action*, 48 Val. U. L. Rev. 535, 553 (2014) ("If race-conscious affirmative action is to survive as a constitutionally permissible policy [after *Fisher I*,] lawyers will have to become more specific in the articulation of the diversity interest."). A clearly identified interest is "necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. . . ." *Id.* at 510. Thus, "'[u]nless [the governmental body] *clearly articulates the need and basis* for a racial classification, . . . the court should not uphold'" the race-based policy. *Adarand*, 515 U.S. at 229 (emphasis in original) (quoting *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting)).

As noted by Judge Garza, the University failed to clearly articulate the interest it hoped to achieve through race-based admissions. *See Fisher*, 758 F.3d at 666 (Garza, J., dissenting) ("This is the crux of this case – absent a meaningful explanation of its desired ends, the University cannot prove narrow tailoring under its strict scrutiny burden."). Parroting the language of *Grutter*, the University stated that achieving a "critical mass" of campus diversity was essential to achieving its educational mission. *Id.* The University, however, failed to explain what constitutes "critical mass."

Instead of scrutinizing the University's purported diversity goals, the panel majority accepted the University's argument without analysis. The panel majority concluded that, while the race-based aspects of the admissions program did not significantly increase the number of racial minorities, "[t]he numbers support [the University's] argument that its holistic use of race in pursuit of diversity is not about quotas or targets, but about its focus upon individuals. . . ." *Fisher*, 758 F.3d at 654. If the University's diversity goals were about individuals, however, then it needed to demonstrate why racial diversity, rather than diversity of other traits, was a necessary aspect of its admissions program.[5] *Id.* at 670 (Garza, J.,

---

[5] Furthermore, the University's attempted articulation of its "critical mass" goals were presented for the first time on remand from this Court. *See* Brief for Petitioner at 30-35. In order to survive strict scrutiny, however, a compelling state interest

(Continued on following page)

dissenting) ("the University claims, absent its race-conscious holistic admissions program, it would lose the minority students necessary to achieving a qualitative critical mass. But it offers no evidence in the record to prove this. . . .").

Furthermore, the University also needed to clearly explain the goals it hoped to achieve through race-based admissions. Instead, the University offered "a nebulous amalgam of factors – enrollment data, racial isolation, racial climate, and 'the educational benefits of diversity' – that its internal periodic review is calibrated to detect." *Id.* at 673 (Garza, J., dissenting). By accepting these purported diversity goals at face value, the panel majority failed to provide any meaningful review of the University's diversity goals. *Id.*; *cf. United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000) (Congress "must present more than anecdote and supposition" to establish a compelling interest.). Accordingly, this Court should reverse the judgment of the Fifth Circuit. Furthermore, because the University was unable to articulate its diversity goals, this Court should hold the University's race-based admissions program unconstitutional.

"justification must be genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

IV. THE UNIVERSITY'S INABILITY TO CLEARLY DEFINE ITS EDUCATIONAL GOALS DEMONSTRATES THE NEED FOR THIS COURT TO OVERTURN *GRUTTER*.

The University's attempted articulations of its "critical mass" goals demonstrate the need to reexamine whether a court should accord any deference to a university's judgment that diversity is essential to its academic mission. In *Fisher I*, this Court accepted the University's purported diversity goal based on this Court's previous decision in *Grutter* and concluded that the need for student body diversity is "an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*." 133 S. Ct. at 2419.

As demonstrated above, authorizing deference to the University's justification for race-based admissions policies allowed the panel majority to accept an unarticulated objective that made scrutinizing the University's admissions policy nearly impossible. *Fisher*, 758 F.3d at 673 (Garza, J., dissenting). Instead, strict scrutiny can only be achieved by scrutinizing the purported state interest, as well as the means for achieving that interest. *Wygant*, 476 U.S. at 278 (1986) (plurality opinion); *Croson*, 488 U.S. at 510; *see also Fisher*, 758 F.3d at 674 (Garza, J., dissenting) ("The University's burden is to prove that *its own* use of racial classifications is necessary and narrowly tailored for achieving *its own* diversity objectives." (emphasis in original)). The continuing application of *Grutter* is inconsistent with the proper application of strict

scrutiny. As stated in the Petition for Writ of Certiorari, "[i]f *Fisher I* permits [the University] to prevail here, the Court will need to rethink its endorsement of *Grutter*'s diversity interest. . . ." Petition at 30. Accordingly, this Court should overturn *Grutter*.

A. *Grutter* Abandoned Longstanding Equal Protection Precedent By Deferring To A Governmental Entity's Statement Of A Purported Compelling State Interest.

This Court should overturn *Grutter* because it "was a radical departure from [this Court's] strict-scrutiny precedents." *Fisher I*, 133 S. Ct. at 2423 (Thomas, J., concurring). In *Grutter*, the University of Michigan Law School argued that the compelling interest for its racially discriminatory admissions policy was to obtain "the educational benefits that flow from a diverse student body." 539 U.S. at 328. The law school asserted that these benefits could be achieved only when a "critical mass" of underrepresented minority students had been admitted. *Id.* at 329. As in this case, the University of Michigan Law School in *Grutter* could neither describe nor quantify critical mass:

> "[C]ritical mass" means "meaningful numbers" or "meaningful representation," which . . . [is] a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. . . . [T]here *is no number, percentage, or range of numbers . . . that constitute critical mass.*

Id. at 318 (emphasis added); *id.* at 319 ("[C]ritical mass means numbers such that underrepresented minority students do not feel . . . like spokespersons for their race.").

Unfortunately, this Court accepted the University of Michigan's vague definition and did not require the law school to either define or quantify "critical mass" or establish how it might determine when "critical mass" was achieved. *Id.* at 335 ("[A] permissible goal . . . requires only a good faith effort . . . to come within a range demarcated by the goal itself.") (internal quotations omitted). This Court then simply deferred to the law school's judgment, ruling that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Grutter*, 539 U.S. at 328. In short, the *Grutter* majority seemed to suggest that this Court lacked competence to strictly scrutinize the law school's racially discriminatory action, ruling that such "complex educational judgments . . . lie primarily within the expertise of the university." *Id.*

This Court's decision in *Grutter* is inconsistent with the requirements that a court must apply strict scrutiny to race-based government programs. *See Fisher I*, 133 S. Ct. at 2419 ("There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity." (citing *id.* at 2422 (Scalia, J., concurring); *id.* at 2423-24 (Thomas, J., concurring); *id.* at 2432-33 (Ginsburg, J., dissenting)). Contrary to *Adarand* and *Croson*, the *Grutter* majority ruled that

"'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary'" by the plaintiff. *Grutter*, 539 U.S. at 329. As this Court made clear in previous cases, however, "more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." *Adarand*, 515 U.S. at 226 (internal quotation omitted); *see also Croson*, 488 U.S. at 501.

In fact, in *Croson*, this Court strongly condemned "blind judicial deference to legislative or executive pronouncements of" the need for race-based classifications. 488 U.S. at 501. A plurality of the Court stated that "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.* at 493 (plurality op.). The reasoning in *Grutter* makes it much more difficult to "smoke out" illegitimate uses of race by governmental entities because it does not require a court to scrutinize the government's intentions in using racial classifications. The presumption of validity afforded to schools' diversity goals also violates the long-standing principle that any racial classification is "presumptively invalid." *Pers. Adm'r of Mass.*, 442 U.S. at 272. Instead of deferring to a school's justification for race-based admissions, this Court's precedent requires a court to conduct a skeptical, searching examination of the ends, as well as the means, of a race-based government program. *See Adarand*, 515 U.S. at 223, 227.

In short, the majority's analysis in *Grutter* bears a striking resemblance to rational basis scrutiny, rather than strict scrutiny. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) ("The Court . . . does not apply strict scrutiny [and] undermines both the test and its own controlling precedents."). At best, *Grutter* applied a weak version of intermediate scrutiny. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 229-30 (1997) (O'Connor, J., dissenting) ("Although [in intermediate scrutiny cases] we owe deference to Congress' predictive judgments and its evaluation of complex economic questions, we have an independent duty to identify with care the Government interests supporting the scheme, to inquire into the reasonableness of congressional findings regarding its necessity, and to examine the fit between its goals and its consequences." (citing *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).[6] This Court, however, has clearly rejected even intermediate scrutiny as too

---

[6] Even intermediate scrutiny, however, requires a court to examine the purported interest offered by the government. *Edenfield*, 507 U.S. at 770-71 (1993) ("This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

deferential when analyzing race-based government programs. *Adarand*, 515 U.S. at 226-27.

Thus, *Grutter* violated well-established equal protection jurisprudence, including *Adarand* and *Croson*, and this Court should overturn *Grutter* as inconsistent with prior strict scrutiny precedent. Indeed, "[*s*]*tare decisis* is not an inexorable command. . . ." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Instead, as Justice Frankfurter stated, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Furthermore, as this Court stated in *Adarand*:

> Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

515 U.S. at 231. The longstanding and sound equal protection jurisprudence requires that a court place the burden on the government, with no deference granted, to prove both that there is a compelling

interest in achieving diversity and that the methods used are narrowly tailored to achieve that purported interest. Because *Grutter* broke from that precedent, this Court should overturn the decision and not defer to a university's stated compelling state interest in achieving diversity.

B. "Critical Mass" Is An Amorphous Concept That Cannot Be Addressed By A Narrowly Tailored Remedy.

Furthermore, it is unclear whether a "critical mass" justification could ever survive strict scrutiny. As demonstrated above, the University was unable to define its "critical mass" goal with any objective standards. Because this Court did not overturn *Grutter*, however, the panel majority deferred to the University's unintelligible goals. *Fisher*, 758 F.3d at 642-43.

In order to survive strict scrutiny, a race-based program must have an "exact connection between justification and classification. . . ." *Adarand*, 515 U.S. at 229 (internal quotations omitted). The goal of reaching a "critical mass" of diversity on campus makes analyzing a connection to a university's admissions criteria nearly impossible because "[t]here is no number that constitutes 'critical mass.'" *Grutter*, 539 U.S. at 318. Because there are no objective criteria for "critical mass," "attempted articulations of 'critical mass'" will likely be "subjective, circular, or tautological." *Fisher*, 758 F.3d at 667 (Garza, J., dissenting). In other words, it is likely that "critical

mass" is "too amorphous a basis for imposing a racially classified remedy . . . [and] has little probative value in supporting a race-conscious measure." *Croson*, 488 U.S. at 497. Accordingly, no court can adequately determine whether a "critical mass" of minority students is present and whether racially discriminatory admissions policies are required to achieve that "critical mass."

Furthermore, allowing "critical mass" to continue as a compelling interest creates "few incentives to make the existing minority admissions schemes transparent." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). This lack of transparency is demonstrated by this case. As stated by Judge Garza below "the University has obscured its use of race to the point that even its own officers cannot explain the impact of race on admission to competitive colleges." *Fisher*, 758 F.3d at 672; *id.* ("the role played by race in the admissions decision is essentially unknowable"). "Critical mass" diversity goals are not "clearly identified and unquestionably legitimate" and, thus, are "harmful to the entire body politic. . . ." *Fullilove*, 448 U.S. at 533-35 (Stevens, J., dissenting).

Thus, this Court should abandon "critical mass" as an acceptable compelling interest and make clear that "diversity can only be the means by which the University obtains educational benefits; it cannot be an end pursued for its own sake." *Fisher I*, 133 S. Ct. at 2424 (Thomas, J., concurring). "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This

the Constitution forbids." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.) (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *Brown v. Board of Education*, 347 U.S. 483 (1954)). Accordingly, this Court must overturn *Grutter* and require universities to prove that "the *educational benefits* allegedly produced by diversity . . . rise to the level of a compelling state interest" rather than allowing diversity itself to be a compelling interest. *Fisher I*, 133 S. Ct. at 2424 (Thomas, J., concurring) (emphasis in original).

CONCLUSION

This Court should reverse the judgment of Fifth Circuit because the panel majority failed to apply strict scrutiny to the race-based aspect of the University's admissions policy. Furthermore, because the University did not and cannot demonstrate that its race-based admissions program was narrowly tailored to achieve a compelling state interest, this Court should hold that the program violates the Equal Protection Clause of the Fourteenth Amendment.

Dated this 10th day of September 2015.

Respectfully submitted,

STEVEN J. LECHNER
Counsel of Record
JEFFREY W. MCCOY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jmccoy@mountainstateslegal.com

Attorneys for Amicus Curiae